HONG LEONG FINANCE BERHAD

v.

SINMAHTAT CONSTRUCTION SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: (MTl) 22-452-1998]
23 JULY 2002

CIVIL PROCEDURE: *Affidavits - Corrective affidavit - Plaintiff's solicitor deposed corrective affidavit on behalf of plaintiff - Whether admissible*

This was an appeal in relation to an application for leave to file a corrective affidavit ('said application'). The issue was whether the plaintiff's solicitor could depose the corrective affidavit to an earlier affidavit of the plaintiff filed in support of an application for summary judgment.

Held (allowing the appeal):

(1) The said application was not an attempt to introduce fresh evidence since the facts averred remain the same. It was in fact an application to amend the exhibits averred to in the supporting affidavit that was wrongly annexed as exhibits. It was simply a case of placing the correct exhibits as identified in the averments in the affidavit and as such could not be said to introduce fresh evidence. (para 8)

(2) The plaintiff's solicitor deposed, in a supporting affidavit, that she was the author behind the confusion and negligence that led to the wrong exhibits being exhibited. Since she was the author of the mistake, she was the proper deponent of the corrective affidavit. Further, the nature of affidavits is to affirm facts within the deponent's knowledge. The plaintiff could not be the proper deponent since the confusion and negligence did not emanate from the plaintiff nor was caused by the plaintiff. Such facts were exclusively within the knowledge of the plaintiff's solicitor. Hence, the supporting affidavit of the solicitor and not of the plaintiff was the proper affidavit in this application. (para 10)

(3) The admission of the correct exhibits was fundamental to the dispensation of justice. In no way would it jeopardise the defendants as they were still within their rights to reply to the corrective affidavit and canvass their arguments in court. Rectification of affidavits through supplementary or corrective affidavits can be made at any stage of the proceedings either on the court's own motion or on the application of any party (*Sarjudin Bakri v. Punca Klasik Sdn Bhd & Anor*). (para 12 & 13)

Case(s) referred to:

Cheah Thean Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1981] 1 CLJ (Rep) 386 HC ***(refd)***

Esso Standard Malaya v. Southern Cross Airways (M) Bhd [1971] 1 MLJ 168 ***(refd)***

Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] 1 CLJ 85; [1981] CLJ 53 FC ***(refd)***

Kwan Yoon Fatt & Sons Sdn Bhd v. Trends Building Sdn Bhd & Ors [1994] 4 CLJ 996 HC ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1993] 1 MLJ 316 ***(refd)***

Sarjudin Bakn v. Punca Klasik Sdn Bhd & Anor [1997] 2 CLJ Supp 481 HC ***(refd)***

Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor [1998] 1 CLJ 395 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 8(1)(b)

For the plaintiff - Nor Aishah Abdul Rahman; M/s Abdul Raman Saad & Assocs

For the defendants - Yoong How Kiat; M/s HK Yoong

Reported by Usha Thiagarajah

JUDGMENT

Syed Ahmad Helmy JC:

[1] The appeal herein relates to an application for leave to file a corrective affidavit to the earlier affidavit of Yau Yin Wee affirmed on 16 August 2000 filed in support of an application for summary judgment under O. 14 of the Rules of the High Court 1980 which exhibited the wrong exhibits as averred in the affidavit.

[2] The leave application is for the purpose of exhibiting the correct exhibits as averred to in both the affidavit of 16 August 2000 and the statement of claim. A

[3] In a summary judgment application the determination of whether there are triable issues would invariably necessitate an evaluation of the proper exhibits - hence the question arises whether if the wrong exhibits were annexed can it be cured by an amended affidavit. B

[4] In *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1993] 1 MLJ 316 it was held: C

> Any defects or omission in the original affidavit may be cured or supplemented or supplied by an affidavit made subsequently and the court looks at the matter both on jurisdiction and on merits.

D

[5] The essence of a summary judgment application under O. 14 RHC when faced with the construction of documents must necessarily relate to the presence of the proper and correct document for the court's determination and the principle regulating same is what was the true construction and if upon the true construction, there could not be any reason to formally go to trial where no further facts could emerge which would throw light on the documents that had to be construed - summary judgment ought to be given - *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] 1 CLJ 85; [1981] CLJ (Rep) 53 approving *Esso Standard Malaya v. Southern Cross Airways (M) Bhd* [1971] 1 MLJ 168. E F

[6] Affidavit being a pleading O. 18 r. 8(1)(b) RHC 1980 imposes a mandatory obligation upon a party to disclose to the other side any matter which, if not specifically pleaded might take the opposite party by surprise - *Kwan Yoon Fatt & Sons Sdn Bhd v. Trends Building Sdn Bhd & Ors* [1994] 4 CLJ 996. G

[7] On the issue of whether the application to amend affidavit in the midst of the hearing of an Order 14 application amounts to introduction of fresh evidence and offends the principles laid down in *Cheah Thean Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 and *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor* [1998] 1 CLJ 395 pertaining to abuse of process tantamount to reopening of the case, the answer is in the negative as the factual matrix is different. The H I

facts in *Yian Sdn Bhd*'s case reveals that the submissions of both the applicant and respondent on the substantive motion had been completed and the only outstanding point was the submission in reply of the applicant. Further the impugned affidavit relates to the refusal of the Datuk Bandar to affirm an affidavit and leaving it to his planning director to affirm the affidavit on his behalf.

[8] The factual matrix herein is not an attempt to introduce fresh evidence as the facts averred remains but rather to amend the exhibits averred to in the supporting affidavit which was wrongly annexed as exhibits - it is simply a case of placing the correct exhibits as identified in the averments in the affidavit and as such cannot by any stretch of imagination be said to amount to introduction of fresh evidence.

[9] It should be borne in mind that the statement of claim pleaded the number and date of both the hire purchase agreement and the Guaranty & Indemnity, namely No. 114-40-00618-5 and dated 16 August 1997 - see para. 6 and 9 of the statement of claim. The same Hire Purchase Agreement No. 114-40-00618-5 dated 16 August 1997 and the Guaranty and Indemnity also dated 16 August 1997 was averred to in the supporting affidavit of Yau Yim Wee in encl. 23A - para 10 & 13 thereof but the exhibits marked YYW-1 and YYW-2 exhibited thereto wrongly annexed agreement No. 114-40-00562-6 dated 1.7.1997 and a Guaranty & Indemnity also dated 1 July 1997. Though different agreements were annexed, nevertheless the point to note is that they relate to the same parties and was part of several hire purchase agreements entered into between the parties as averred in para. 7 and 8 of the supporting affidavit of Nor Aishah binti Abdul Rahman affirmed on 30 July 2001. It is pertinent also to note that the statement of defence of both the 1st and 2nd defendant is a bare denial subjecting plaintiff to strict proof.

[10] The reason behind the application to amend is found in the supporting affidavit of Nor Aishah binti Abdul Rahman affirmed on 30 July 2001. The deponent is the solicitor of the plaintiff and the reason furnished is because she was the author behind the confusion and negligence that led to the wrong exhibits being exhibited which arose because all the documents pertaining to the Hire Purchase Agreements and the Guaranty & Indemnity between the plaintiff and the defendants respectively were placed in a single file and she only found it out in the midst of the

summary judgment application submission - paras. 9 and 10 thereof. In such a situation, she being the author of the mistake was the proper deponent of the application of leave to file in a corrective affidavit, which application upon leave being granted would entail the filing of a corrective affidavit by the plaintiff himself by exhibiting the correct exhibits as averred. It must be emphasized that the nature of affidavits is to affirm facts within deponents knowledge; and hence it follows that the plaintiff cannot be the proper deponent for the confusion and the negligence which never emanated nor caused by him as such facts are exclusively within the knowledge of the solicitor. Hence the supporting affidavit of the solicitor and not the plaintiff is the proper affidavit in an application of this nature, namely leave to file corrective affidavit.

[11] I must at this stage stress that the purpose of all application before the court is with the ultimate objective of securing justice being dispensed and for justice to be dispensed it is imperative that all proper documents be placed for the courts consideration - justice can never be imparted by default or by mistake.

[12] The admission of the correct exhibits is fundamental for the dispensation of justice and in no way would jeopardize the defendant as they are still within their rights to reply to the corrective affidavit and canvass their arguments that a triable issue arises for them to have their day in court.

[13] In *Sarjudin Bakn v. Punca Klasik Sdn Bhd & Anor* [1997] 2 CLJ Supp. 481 the court held that rectification of affidavits through supplementary or corrective affidavits can be made at any stage of the proceedings either on the court's own motion or on the application of any party.

[14] By reason thereof I allowed the appeal in encl. 35 with costs.